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JUL 11 1991

BEFORE THE

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In re Application of)
THE FIDELIO GROUP, INC.)
For a Contruction Permit for a)
New FM Station on Channel)
282B (104.3 MHz),)
New York, New York)

File No. BPH-910502MQ

TO: Chief, Mass Media Bureau

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FM EXAMINERS

MOTION TO STRIKE FIDELIO'S RESPONSE AND
OPPOSITION TO FIDELIO'S MOTION FOR LEAVE TO FILE RESPONSE

GAF Broadcasting Company, Inc. ("GAF"), licensee of Station WNCN(FM), New York, New York, by its attorneys, hereby moves to strike the June 28, 1991 "Response" of the Fidelio Group, Inc. ("Fidelio") from the record in this proceeding because it violates Section 1.45 of the Commission's Rules. GAF also opposes Fidelio's "Motion" for leave to file its unauthorized Response. In support whereof, GAF shows as follows:

It is undisputed that Fidelio filed its competing renewal application against WNCN on May 2, 1991, one day after the

deadline set by Section 73.3516(e) of the Commission's Rules. 47 C.F.R. §73.3516(e). On May 30, 1991, GAF filed a "Request" that the Commission return the Fidelio application as untimely. On June 13, 1991, Fidelio filed its lengthy "Opposition," which sought to show why its application was not untimely.^{1/} GAF filed its "Reply" on June 24, 1991, thereby concluding the pleading cycle under Section 1.45 of the Commission's Rules. 47 C.F.R. §1.45.

The limits set by Section 1.45 could not be more clear

permit pleadings subsequent to a reply only after the Commission has determined that further pleadings are warranted. Fidelio seeks to preempt the Commission from that determination by placing its unauthorized Response into the Commission's hands before the Commission can determine if additional argument is needed (and before GAF has a fair opportunity to object). Failure to strike Fidelio's Response would thus undercut Section 1.45 and promote unauthorized pleadings.

Fidelio also filed a "Motion" to have its unauthorized Response accepted. The Motion should be denied. It is based solely on Fidelio's claims that GAF raised "new issues" in its Reply. Fidelio Motion at 2. This is simply untrue; indeed, Fidelio fails to identify any new issues. Fidelio acknowledges in its Motion that GAF's initial Request raised "several issues."

Specifically, Fidelio in its Opposition claimed that the deadline for feeable applications had been automatically extended pursuant to the policy set forth in the MO&O regarding certain "time critical" Pittsburgh fee filings. Fidelio Opposition at 2. GAF in its Reply noted that the MO&O defined "time critical" applications as only those filed in response to "a 'window' or a 'cut-off' list established by the Commission." MO&O, 67 RR 2d at 876 [emphasis supplied]. Thus, contrary to Fidelio's assertions in its Opposition, the definition encompasses only those applications filed in response to periodic Public Notices released by the FCC which provide applicants a brief and finite period to prepare and submit their applications. The deadline for competing broadcast renewal applications is set forth in Section 73.3516(e) of the Rules, and not in a Public Notice established by the Commission to announce a specific "window" or "cut-off" list. The reference in the MO&O to "time-critical" applications does not include all applications which must be filed by a fixed deadline,^{3/} and there is no indication that the Commission intended the grace period procedure to override and repeal the explicit filing deadline for competing renewal applications set forth in Section 73.3516(e) of the Commission's Rules.

Fidelio also argued in its Opposition that the back-up filing procedures established in the MO&O are completely

^{3/} To the contrary, the Commission explicitly stated in the MO&O that it intended to cover only a "limited" class of time-critical applications, but "in the future" it might "consider the extension of this procedure to other time-critical application filings." MO&O, 67 RR 2d at 877, n.16.

voluntary, and do not constitute a necessary predicate to the grant of an extra filing day. Fidelio Opposition at n.6. As GAF explained at pp. 6-10 of its Reply, this position is contrary to the explicit language of the MO&O.^{4/} The lone reference to a one-day grace period for certain time-critical applications appears within the confines of paragraph 14 of the MO&O. When that paragraph is read in its entirety, it is abundantly clear that "delivery of the application to the lockbox bank on the next business day after the deadline date shall constitute a timely filing of the application" only if the detailed procedures described in paragraph 14 are expressly followed. Such procedures may be optional, in that an applicant can always file on the established deadline. However, such procedures are mandatory if an applicant desires to take advantage of the one-day grace period. Having failed to follow the back-up filing procedure, Fidelio is not entitled to the one-day grace period.



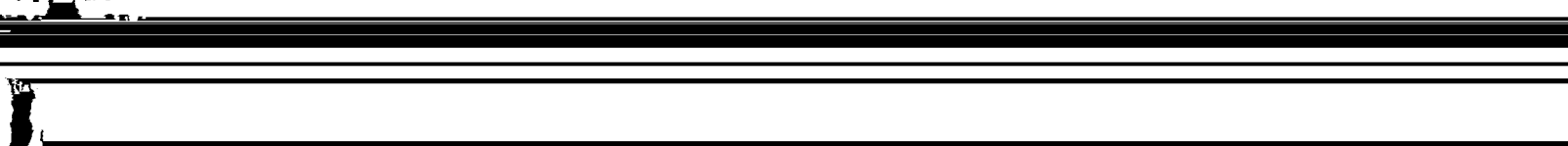
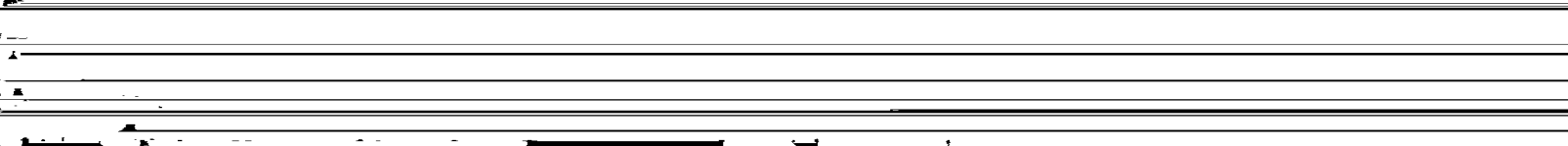
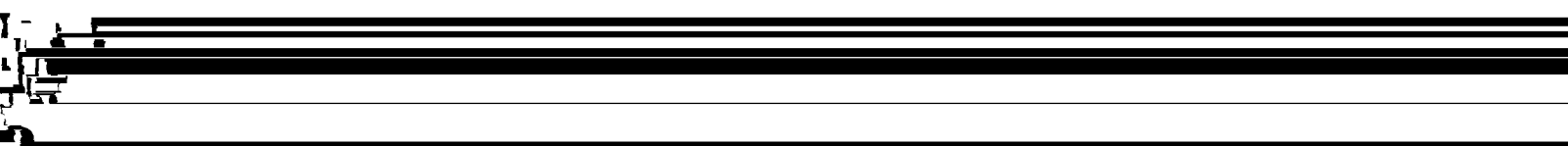
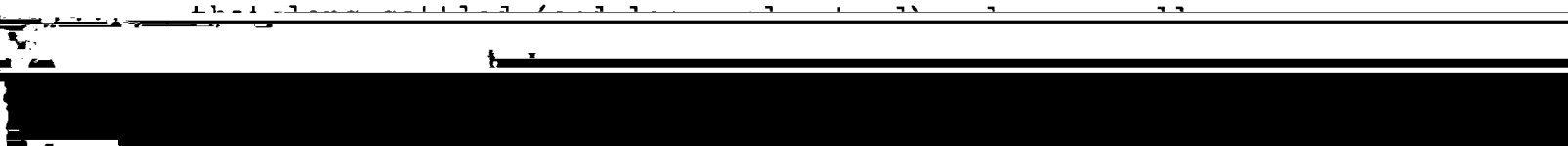
In sum, GAF's June 24, 1991 Reply did no more than rebut the specific arguments raised by Fidelio in its Opposition, as the rules permit GAF to do. No new issues were raised.^{5/} The

^{4/} Significantly, Fidelio now concedes that the procedures set forth in the MO&O were not modified by the May 9, 1990 Public Notice. Fidelio Response at n.5.

^{5/} Fidelio falsely asserts that, in its initial Request, GAF attempted to mislead the Commission by "feigning ignorance" of the Commission's extra day policy and by failing to address the back-up procedure until its Reply. Fidelio Motion at 1-2. In fact, GAF expressly stated in its Request that Fidelio was not eligible for the back-up filing procedures, which were established by the MO&O. GAF Request at 3. If anyone is guilty of submitting "misleading" pleadings, it is Fidelio in its selective quotes from the MO&O.

FCC Rules squarely do not allow Fidelio to make still another attempt at persuading the Commission at this late stage in the proceeding. There is nothing in Fidelio's new Response that it could not have said in its Opposition. The facts are unchanged, and the legal issue is the same. The Commission has repeatedly rejected such efforts to prolong the pleadings cycle, and should do so here. See, e.g., Llerandi v. FCC, 863 F.2d 79 (D.C. Cir. 1988).

Under Section 73.3516 of the Rules, Fidelio's application is untimely and must be returned. The one-day grace period Fidelio seeks to invoke cannot be applied here without rewriting



CERTIFICATE OF SERVICE

I, Elyse N. Sanchez, a secretary with the law firm of Fleischman and Walsh, P.C., certify that on the 11th day of July, 1991, the foregoing "Motion to Strike Fidelio's Response And Opposition To Fidelio's Motion For Leave To File Response" was sent via U.S. first-class mail, postage prepaid, to the following:

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